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Beyond *City of Philadelphia v. New Jersey*

Stephen M. Johnson*

I. Introduction

The first shot in the "second civil war" was fired in the North, at the state house in Trenton, New Jersey. In 1973, the New Jersey General Assembly enacted legislation that forbade the importation of any solid waste generated outside of the state.[1] The problem of garbage disposal reached crisis proportions in the United States in the 1980s due to the massive industrialization of the twentieth century. The increased consumption of products and pace of living encouraged society to rely on prepackaged, single-use, disposable commodities.

As the volume of solid waste produced by the citizens of the United States increased, man's knowledge of the widespread public health, safety, and environmental problems caused by burying solid waste in landfills has also increased. The federal government has aggressively sought to minimize the dangers created by hazardous wastes, although it has not adequately addressed the nonhazardous waste disposal crisis through legislation or regulation.[2] In order to protect public health and safety, many states have attempted to fill the void created by federal inaction and have imposed strict limitations on the methods of solid waste management and the volume of solid waste that can be disposed of in those states.[3] In their zeal to protect public health and safety, however, some states have enacted legislation designed to isolate the state from the solid waste manage-

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1. N.J. STAT. ANN. § 1311-10 (Repealed 1981).

2. Although the Federal Resource Conservation and Recovery Act ("RCRA") authorizes the federal government to regulate solid waste management and includes provisions addressing state and regional solid waste planning, the primary focus of the Act is on the management of hazardous waste, and the federal government has not taken an active role in the regulation of non-hazardous waste. 42 U.S.C.A. §§ 6901-6992k (1976 & Supp. 1989).

3. *See, e.g.*, MICH. COMP. LAWS §§ 13.29(1)-.29(36) (1987); R.I. GEN.LAWS § 23-19-13.1 (1989).

ment crisis shared in common by all of the states.[4] Protectionist legislation, such as the New Jersey solid waste import ban,[5] often imposes unconstitutional burdens on the interstate flow of commerce.[6]

II. Solid Waste Becomes an Article of Interstate Commerce

In the 1987 landmark case, *City of Philadelphia v. New Jersey*,[7] the United States Supreme Court struck down as unconstitutional New Jersey's solid waste import ban. In *City of Philadelphia*, the Court held that solid waste may be an article of interstate commerce. Therefore, state regulation of the interstate flow of solid waste must be consistent with the commerce clause of the United States Constitution.[8] The Court held that New Jersey's ban on the importation of all solid waste into the state unconstitutionally interfered with interstate commerce.[9] Further, the Court clarified that states retain the authority to regulate solid waste management activities affecting interstate commerce but not violating the commerce clause.[10] Finally, the Court identified the standard for measuring the constitutional validity of such state regulation.[11]

Many state officials failed to learn the lesson taught in *City of Philadelphia* and instead implemented regulatory schemes almost identical to the scheme struck down by the Court in that case. For instance, in 1987, the Governor of West Virginia issued an Executive

4. *See, e.g.*, W. Va. Exec. Order No. 6-87 (1987), *reprinted in* Industrial Maintenance Serv., Inc. v. Moore, 677 F. Supp. 436, 437 n.1 (S.D. W. Va. 1987).

5. *See supra* note 1 and accompanying text.

6. *See* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Industrial Maintenance Serv., Inc. v. Moore, 677 F. Supp. 436 (S.D. W. Va. 1987).

7. 437 U.S. 617 (1978).

8. *Id.* at 629.

9. *Id.*

10. *Id.* at 623.

11. *Id.* at 624. According to the *City of Philadelphia* court, "where [state action] regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 624 (citing Pike v. Bruce Church, 397 U.S. 137, 142 (1970)). However, the *City of Philadelphia* court established a more stringent standard of review, a "virtually per se rule of invalidity" for purely protectionist state action. *Id.* at 624. The Court has tempered that standard in the years following its decision. *See* Maine v. Taylor, 477 U.S. 131 (1986).

Since Congress has the Constitutional authority to regulate interstate commerce, U.S. CONST. art. 1, § 8, cl. 3, it is possible that Congress may render moot through federal legislation many of the questions regarding permissible state limits on waste imports. In that regard, Ohio Representative Thomas Lukens has recently proposed legislation to reauthorize RCRA, which includes a provision that specifically authorizes states to ban solid waste imports if certain conditions are met. H.R. 3735, 101st Cong., 1st Sess. § 303(a) (1989).

Similar legislation was introudced in the Senate by Senators Dan Coats and Mitch McConnell as an amendment to the fiscal 1991 District of Columbia appropriations bill. H.R. 5311, 101st Cong., 2d Sess. (1990).

Order that deprived the State Department of Natural Resources of the authority to confirm, license, or renew a license, or to encourage in any manner the disposition in West Virginia of solid waste other than that generated by the citizens of West Virginia themselves.[12] Not surprisingly, the Executive Order was struck down by the United States District Court for the Southern District of West Virginia.[13] In general, state regulatory schemes banning the importation of solid waste generated outside of a state that allows the disposal of the same type of solid waste generated within the state have been struck down by the lower federal courts as unconstitutional.[14]

City of Philadelphia demonstrated to the states, however, that there are methods of state regulation of solid waste management that affect interstate commerce but do not violate the commerce clause.[15] The reasoning underlying subsequent commerce clause cases suggests even further regulatory schemes available to states beyond the schemes suggested by the Court in *City of Philadelphia*.[16] Many of the regulatory schemes affecting interstate commerce have

12. W. Va. Executive Order No. 6-87 (1987), *reprinted in* Industrial Maintenance Serv., Inc. v. Moore, 677 F. Supp. 436, 437 n.1 (S.D. W. Va. 1987).

13. *Industrial Maintenance Serv.*, 677 F. Supp. at 444.

14. *Id.* at 443. *See* National Solid Waste Management Ass'n v. Alabama Dep't of Envtl. Management, No. 90-7047 (11th Cir. Aug. 8, 1990) (Alabama law prohibiting the disposal in Alabama of hazardous waste generated in states that prohibit the disposal of hazardous waste within their borders or in states that do not provide for hazardous waste treatment or disposal capacity as required by the Federal Comprehensive Environmental Response Compensation and Liability Act held to violate the commerce clause); Washington State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman, 684 F.2d 627, 631 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1982) (Washington law prohibiting the transportation and storage of radioactive waste in the state if the waste was generated outside of the state held to violate the commerce clause).

15. The Court suggested that New Jersey could slow the flow of all waste into the state's landfills without unconstitutionally interfering with interstate commerce. City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978). The Court also suggested that its decision might not apply in cases in which the state or local government acts as a market participant rather than a market regulator. *Id.* at 627, n.6. The market participant exception to the commerce clause was established by the Supreme Court in Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 805-10 (1976).

The lower federal courts have generally upheld state or local solid waste management schemes involving the state or local government as a market participant. *See, e.g.*, Swin Resource Systems v. Lycoming County, 678 F. Supp. 1116 (M.D. Pa. 1988), *aff'd*, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1127, 107 L.Ed.2d 1033 (1990) (county-imposed volume restrictions and tipping fees for disposal at the county-operated landfill upheld under the market participant doctrine); LeFrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987) (state prohibition on disposal of solid waste generated out-of-state at a state-subsidized sanitary landfill upheld under the market participant doctrine); and Shyane Bros., Inc. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984) (court upheld a District of Columbia health regulation prohibiting the disposal of solid waste generated outside of the city in disposal facilities operated by the District without approval).

16. The Supreme Court's decisions in Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982) and Maine v. Taylor, 477 U.S. 131 (1986) widen a state's latitude in imposing restrictions on the interstate flow of solid waste that do not violate the commerce clause.

been upheld by the lower federal courts, even though the schemes have a greater impact on out-of-state waste than waste produced within a state.[17]

Determining whether state regulation of solid waste management unconstitutionally interferes with interstate commerce is a delicate determination, based upon a balancing of interests with each scheme evaluated on its own merits. Protectionist schemes, such as those struck down in *City of Philadelphia*, are likely to be held unconstitutional. States are, however, able to take measures to regulate solid waste that protect the public health, safety, welfare and the environment and still continue to recognize the role of the state in the brotherhood of the federal system. Pennsylvania Governor Robert Casey's Executive Order 1989-8[18] exemplifies one such measure.[19]

III. Pennsylvania's Regulation of Municipal Waste and Executive Order 1989-8

A. Legislative Action

The purpose and effect of Executive Order 1989-8 can only be fully understood when considered within the framework of Pennsylvania's comprehensive municipal waste management program. Under Pennsylvania's Solid Waste Management Act,[20] a person may neither own nor operate facilities to process or dispose of municipal waste in Pennsylvania without a permit from the Commonwealth's Department of Environmental Resources ("DER"). Furthermore, one may not process, collect, transport, store, or dispose of municipal

17. *See, e.g.*, Bill Kettle Well Excavating v. Michigan Dept. of Natural Resources, 732 F. Supp. 761 (E.D. Mich. 1990) (Michigan law prohibting the disposal of solid waste generated outside of a county in a landfill in the county unless the disposal is authorized in the county's solid waste management plan upheld against a commerce clause challenge); Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987) (municipality's prohibition on the disposal of waste generated outside of a three county district in the municipality's landfill upheld against a commerce clause challenge); Waste Aid Systems, Inc. v. Citrus County, Fla., 613 F. Supp. 102 (M.D. Fla. 1985) (county's prohibition on disposal of waste generated outside of the county in a landfill within the county upheld against a commerce clause challenge); Harvey and Harvey v. Delaware Solid Waste Auth., 600 F. Supp. 1369 (D. Del. 1985) (state regulation requiring that solid waste collected in a county must be disposed of in that county upheld against a commerce clause challenge); Al Turi Landfill, Inc. v. Town of Goshen, 556 F. Supp. 231 (S.D.N.Y. 1982), *aff'd*, 697 F.2d 287 (2d Cir. 1982) (town ordinance setting a cumulative size limitation of 300 acres for all existing and closed landfills in the town, limiting the size of each individual facility to 50 acres held to be a constitutional measure to protect public health and the environment).

18. 19 Pa. Bull. 4598 (codified at 4 PA. CODE § 7.471-7.476 (1990)).

19. *See infra* notes 36-42 and accompanying text.

20. PA. STAT. ANN. tit. 35, §§ 6018.101-6018.1003 (Purdon 1977 & Supp. 1989).

waste in Pennsylvania except in accordance with DER regulations.[21] The Commonwealth promulgated stringent municipal waste regulations that became effective on April 9, 1988.[22] Designed to protect the public health, safety, welfare, and the environment from the dangers of managing the total volume of municipal waste that is managed in the Commonwealth, these regulations apply uniformly to the management of all municipal waste in Pennsylvania, regardless of whether the municipal waste is generated in Pennsylvania or elsewhere.

In addition, the Pennsylvania legislature enacted the Municipal Waste Planning, Recycling and Waste Reduction Act[23] to reduce the volume of municipal waste generated within Pennsylvania, thereby reducing the volume of municipal waste to be disposed of in the state. The Act requires Pennsylvania municipalities to establish mandatory recycling programs through ordinances or regulations.[24] The Act also declares that at least 25% of all municipal waste and source separated recyclable materials able to be separated by source generated within the Commonwealth on or after January 1, 1997 should be recycled.[25]

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21. *Id.* § 6018.201(a). The Act defines "municipal waste" as "any garbage, refuse, industrial lunchroom or office waste and other material including solid, liquid, semisolid, or contained gaseous material resulting from operation of residential, municipal, commercial or institutional establishments and from community activities . . ." *Id.* § 6-18.103.

22. 18 Pa. Bull. 1681 (codified at 25 PA. CODE §§ 271.1-285.222 (1988)). These regulations require that municipal waste landfills be constructed with double liners, a leachate detection zone, and a leachate collection system. 25 PA. CODE §§ 273.251-273.258 (1988). They require landfill operators to conduct groundwater and surface water monitoring at the facility, *id.* §§ 273.281-273.288, and impose restrictions on the siting of municipal waste landfills in certain areas, such as flood plains and wetlands. *Id.* § 273.202. The regulations also limit the types of wastes that can be disposed of in the facility. *Id.* §§ 273.201(d)-(g). Additionally, the regulations establish strict standards governing the storage, collection, and transportation of municipal waste, *id.* §§ 285.101-285.222, composting of municipal waste, *id.* §§ 281.1-281.282, processing of municipal waste, *id.* §§ 283.1-283.403, and land application of sewage sludge. *Id.* §§ 275.1-275.614.

23. PA. STAT. ANN. tit. 53 §§ 4000.101-4000.1904 (Purdon 1970 & Supp. 1989).

24. *Id.* § 4000.1501.

25. *Id.* § 4000.102(c)(1). The Act includes a variety of provisions to accomplish this goal. For example, under the Act, counties are required to establish a 10 year municipal waste management plan that describes how the waste generated within the county during the 10 year period will be managed. *Id.* §§ 4000.501-4000.502. DER may not issue municipal waste processing or disposal permits to facilities that are not provided for in municipal waste management plans unless certain conditions are met. *Id.* § 4000.507. Municipalities are required to establish a program for the collection and composting of leaf waste as part of the mandatory recycling program required by the Act, and truckloads of leaf waste may not be disposed of at municipal waste landfills within two years after the effective date of the Act. *Id.* § 4000.1502(a). The Act also requires operators of resource recovery facilities to remove recyclable materials from the waste to be incinerated at the resource recovery facility to the greatest extent practicable, *id.* § 4000.1502(c), and requires operators of municipal waste landfills, resource recovery facilities, and transfer stations to establish drop-off centers for recyclable materials. *Id.* § 4000.1502(b). In addition, the Act requires Commonwealth agencies, includ-

To encourage reusing materials and to reduce the volume of waste to be disposed of within the Commonwealth, in 1989, the Pennsylvania General Assembly amended the Solid Waste Management Act. This change encouraged the beneficial use of certain municipal and residual wastes.[26] The amendments to the Solid Waste Management Act also enabled DER to issue general permits for the beneficial use or exclusion of those wastes from the strict bonding and insurance requirements that generally apply to processing and disposal of solid waste.[27]

Pennsylvania's Solid Waste Management Act, Municipal Waste Planning, Recycling and Waste Reduction Act, and the regulations promulgated pursuant to those laws, are geared toward protecting the public health and safety and toward preserving natural resources within the Commonwealth. Pennsylvania's Constitution declares that:

> The people have a right to clean air, pure water, and the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[28]

B. Increased Solid Waste Imports

Pennsylvania's Municipal Waste Planning, Recycling and Waste Reduction Act, the Solid Waste Management Act and the regulations promulgated pursuant to those laws[29] encouraged a reduction in the volume of municipal waste generated within the Commonwealth. These Acts and regulations also encouraged a reduction in the amount of landfill space and processing capacity required for the disposal of waste generated within Pennsylvania. It became apparent, however, that those measures failed to address the problems created by an influx of waste generated outside of Pennsylvania.

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ing the Department of General Services, to reduce waste, *id.* § 4000.1503(b), establish a source separation and collection program, and procure recycled materials. *Id.* § 4000.1511, 4000.1504, 4000.1505.

26. 1989 Pa. Laws 1989-55. "Beneficial use" of a waste is defined by the amendments to the Solid Waste Management Act as the use or reuse of a waste when the use does not harm or threaten public health, safety, welfare or the environment. PA. STAT. ANN. tit. 35, § 6018.103 (Supp. 1990). This could include, for example, application of certain types of wastes as fertilizers or the use of a waste as a construction material or road de-icer.

27. PA. STAT. ANN. tit. 35, § 6018.104(18) (Purdon 1977 & Supp. 1989).

28. PA. CONST. art. I, § 27.

29. 25 PA. CODE §§ 271-85 (1988).

Even before Governor Casey issued Executive Order 1989-8, statistics compiled by DER indicated that there was a substantial increase in the rate of waste imports into the Commonwealth.[30] Landfills in neighboring states were quickly reaching their capacity and were being closed, threatening the Commonwealth's comprehensive efforts to preserve its natural resources.[31] Furthermore, the Federal Ocean Dumping Ban Act of 1988[32] required municipalities in New York and New Jersey to cease dumping millions of tons of sewage sludge into the ocean[33] and to implement land based sludge management alternatives by December 31, 1991.[34]

Thus, as Pennsylvania began to effectively remedy the state's own waste problems, the laws and policies of neighboring states encouraged the citizens of those states to dispose of municipal waste in other states, including Pennsylvania. Without further limitations on use, Pennsylvania's laws and regulations would merely create more disposal and processing capacity for outside wastes and less capacity for wastes generated within Pennsylvania. Instead of reducing the public health, safety, and environmental hazards to citizens of the Commonwealth and preserving Pennsylvania's public natural resources, the stringent limitations imposed on Pennsylvanians by the Pennsylvania solid waste laws and regulations would only change the origin of the waste disposed of or processed in Pennsylvania. At the same time, these limitations would reduce the public health, safety, and environmental hazards to citizens of neighboring states and preserve their natural resources at the expense of Pennsylvania's citizens and natural resources.

To reduce the volume of municipal waste disposed of in Pennsylvania landfills and to assure long-term municipal waste disposal capacity to serve the needs of Pennsylvania, on October 17, 1989 Governor Casey signed Executive Order 1989-8.[35] The Executive Order placed several restrictions on DER's authority to issue permits to municipal waste processing and disposal facilities.[36] Further, the Order directed DER to adopt a statewide municipal waste manage-

30. 19 Pa. Bull. 4598, 4599 (1989).

31. *Id.*

32. 33 U.S.C.A. §§ 1414a-c, 1415 (Supp. 1990).

33. The legislative history of the Ocean Dumping Ban Act indicates that nine New York and New Jersey municipalities were disposing of 7.7 million wet tons of sewage sludge per year in the Atlantic Ocean at the time of the Act. S. REP. No. 431, 100th Cong., 2d Sess. 15, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5867, 5881.

34. 33 U.S.C.A. § 1414b(a)(1)(B) (Supp. 1990).

35. 19 Pa. Bull. 4598 (codified at 4 PA. CODE §§ 7.471-7.476 (1990)).

36. 4 PA. CODE §§ 7.471-7.476 (1990).

ment plan.[37] The restrictions in the Executive Order on DER's permitting authority are intended to prevent uncontrolled increases in the volume of municipal waste imported into Pennsylvania while DER prepares and adopts a solution to the problem.[38]

The central provision of the Executive Order is a temporary moratorium on the issuance of permits for new municipal waste landfills or resource recovery facilities.[39] Until DER adopts the statewide municipal waste management plan required by the Executive Order, the agency is directed to cease reviewing applications or issuing new permits for new municipal waste landfills or resource recovery facilities unless the applicant demonstrates a need for additional municipal waste disposal capacity and shows that at least 70% of the municipal waste proposed to be received at the facility is generated within Pennsylvania.[40] The Executive Order also directs DER not to issue permit modifications for the disposal of sewage sludge from any source at municipal waste landfills, unless the permit modification is necessary for compliance with an order issued by the Department.[41] The final major provision of the Executive Order requires immediate DER action to establish maximum and average waste volume limitations for each operating municipal waste landfill in Pennsylvania based upon the actual daily volume of waste disposed of at the landfill.[42]

Because the Executive Order will affect the interstate flow of waste, it has been suggested that its restrictions are unconstitutional violations of the commerce clause. The following sections describe the method of analysis employed by the Supreme Court in determining whether state regulation of natural resources to protect public health and safety violates the commerce clause. This article will also illustrate the constitutionality of Executive Order 1989-8 in light of the commerce clause.

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37. *Id.* § 7.473. That provision directs DER to develop a proposed plan by September 26, 1991. *Id.*

38. *Id.* § 7.471.

39. *Id.* A "resource recovery facility" is defined by the Municipal Waste Planning, Recycling and Waste Reduction Act to be

> [A] processing facility that provides for the extraction and utilization of materials or energy from municipal waste that is generated offsite, including, but not limited to, a facility that mechanically extracts materials from municipal waste, a combustion facility that converts the organic fraction of municipal waste to usable energy, and any chemical or biological process that converts municipal waste into a fuel product.

PA. STAT. ANN. tit. 53, § 4000.103 (Supp. 1989).

40. 4 PA. CODE § 7.471(a) (1990).

41. *Id.* § 7.471(b).

42. *Id.* § 7.472(a).

IV. The Commerce Clause and Protection of Natural Resources

A. The Supreme Court Voices its Position

The commerce clause in the United States Constitution[43] allows Congress to regulate commerce between and among the states. In the absence of federal legislation, however, states retain the authority to impose restrictions on state activities, even interstate commerce, as long as the restrictions are within certain restraints.[44] The restraints that the "dormant" commerce clause imposes on state regulation of interstate commerce are not described in the Constitution itself; instead, they have been developed by the Supreme Court in decisions implementing the commerce clause. A significant number of these decisions regarding the dormant commerce clause and state regulation of interstate commerce addressed state authority to enact measures to protect the health and safety of its citizens and the state's natural resources.[45] The Supreme Court's analysis when faced with state regulation of commerce has evolved radically over the past century.

An early yet significant case that addressed the commerce clause implications of state regulation of natural resources was *Geer v. State of Connecticut*.[46] *Geer* analyzed the validity of a Connecticut statute that allowed persons to kill woodcock, ruffled grouse, and quail, and to transport those birds as long as they remained in the state. These same activities, however, were prohibited if the birds were to be transported out of the state.[47] Valid law for three-

43. *See supra* note 6.

44. City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978).

45. *See* Maine v. Taylor, 477 U.S. 131 (1986) (Maine law protecting the health of the state's baitfish and the state's aquatic environment held not to unconstitutionally interfere with interstate commerce); Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982) (Nebraska regulations protecting the state's limited supply of groundwater held, in part, to unconstitutionally interfere with interstate commerce); Hughes v. Oklahoma, 441 U.S. 322 (1979) (Oklahoma law protecting the ecological balance of the state's aquatic environment by limiting the withdrawal of minnows from the waters of the state held to unconstitutionally interfere with interstate commerce); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (New Jersey law protecting public health and safety by conserving landfill space held to unconstitutionally interfere with interstate commerce); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (West Virginia law protecting the state's limited supply of natural gas held to unconstitutionally interfere with interstate commerce); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (Oklahoma law protecting the state's limited supply of natural gas held to unconstitutionally interfere with interstate commerce); Geer v. Connecticut, 161 U.S. 519 (1896) (Connecticut law protecting the ecological balance of the state's environment by limiting the withdrawal of game birds from the environment held to unconstitutionally interfere with interstate commerce).

46. 161 U.S. 519 (1896).

47. CONN. GEN. STAT. § 2530 (1888). Specifically, the law made it a crime for any person to "kill any woodcock, ruffled grouse or quail for the purpose of conveying the same

quarters of a century, the *Geer* court decision was that wild animals and fish within a state are owned by the state in its sovereign capacity, for the common benefit of all of the people of the state.[48] The Court reasoned that state ownership of animals, coupled with state police power to preserve a valuable food supply for its citizens, authorized the state to regulate the taking, subsequent use, and property rights that may be acquired in wild animals or fish.[49] Further, the Court viewed the Connecticut statute as a limitation on the ability of Connecticut citizens to acquire property rights in certain wild animals consistent with that authority.[50] More importantly, however, the *Geer* court held that because Connecticut law limited the transport of woodcock, ruffled grouse, or quail out of the state, the statute created only *internal* commerce in the animals, and not *interstate* commerce.[51] Thus, the Court opined, the Connecticut law did not interfere with interstate commerce.[52]

The Supreme Court was reluctant to extend the *Geer* rationale beyond state regulation of wild animals. In *West v. Kansas Natural Gas Co.*,[53] the Supreme Court addressed a challenge to an Oklahoma statute that forbade the construction or use of natural gas pipelines if the pipelines were to be used to transport natural gas out of the state.[54] Relying upon the Supreme Court's holding in *Geer*, Oklahoma argued that its statute was aimed at conserving the natural resources of the state and was within the state's police power.[55] By limiting the transportation of natural gas to transportation within the state, Oklahoma argued, the statute created only *internal* commerce in natural gas and did not create or interfere with *interstate* commerce.[56] According to Oklahoma, the challenged statute would only indirectly affect interstate commerce.[57]

The Supreme Court disagreed, however, and refused to apply its ruling in *Geer* to the facts of *West*.[58] In rejecting Oklahoma's argument that the purpose of its statute was conservation of a natural

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beyond the limits of the state; or . . . transport or have in possession, with intention to procure the transportation beyond said limits, of any such birds killed within the state." *Id.*

48. 161 U.S. at 529.
49. *Id.* at 535.
50. *Id.* at 529.
51. *Id.* at 530-31.
52. Geer v. Connecticut, 161 U.S. 519 (1896).
53. 221 U.S. 229 (1911).
54. *Id.* at 249.
55. *Id.*
56. *Id.*
57. *Id.*
58. West v. Kansas Natural Gas Co., 221 U.S. 229, 253 (1911).

resource, the Court held that the statute was actually a commercial statute aimed at protecting the business welfare of the state.[59] The Supreme Court further rejected Oklahoma's argument that the statute in question affected interstate commerce only indirectly. The Court stated that:

> If the states have such a power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. Any why may not the products of the field be brought within the principle? . . . [E]mbargo may be retaliated by embargo, and commerce will be halted at state lines.[60]

Holding that "no state can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on,"[61] the Court struck down the Oklahoma statute as unconstitutional.

A decade later, the Supreme Court addressed a situation similar to that in *Pennsylvania v. West Virginia*.[62] The case involved a challenge to a West Virginia law requiring companies extracting natural gas from wells in West Virginia to give preference to state interests in distribution.[63] West Virginia argued that its statute constituted a valid exercise of police power and affected interstate commerce only incidentally.[64] The Court, however, rejected that argument citing its decision in *West*. Instead, the Court held that West Virginia's law constituted a prohibited interference with interstate commerce.[65] The Court's in *West v. Kansas Natural Gas* and *Pennsylvania v. West Virginia* refused to view the statutes in those cases as true conservation or public health and safety statutes. For this reason, neither case specified the amount of state interference with interstate commerce that would be tolerated to accomplish conservation or public health and safety goals.

Although these cases were important in the early development of dormant commerce clause analysis, they are no longer valid be-

59. *Id.* at 255.
60. *Id.* at 255-56.
61. *Id.* at 261.
62. 262 U.S. 553 (1923).
63. *Id.* at 595.
64. *Id.* at 577-78.
65. *Id.* at 596-97. In the words of the Court, "Natural gas is a lawful article of commerce and its transmission from one state to another for sale and consumption in the latter state is interstate commerce. A state law . . . which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce — a prohibited interference." *Id.*

cause many changes have occurred in the seventy-five years since they were decided.

B. The Dormant Commerce Clause Test

The modern dormant commerce clause analysis involves a two-part test, articulated by the Supreme Court in *City of Philadelphia v. New Jersey*.[66] The two-part test employed by the Court illustrates an "alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people."[67] As the *City of Philadelphia* Court described the analysis, "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.[68] Further, the Court stressed that the "per se rule" applied if a state statute discriminated against out-of-state interests in either purpose or effect.[69] On the other hand, when a state's actions do not affirmatively discriminate against out-of-state interests in favor of in-state interests, the Court explained that it applies a balancing test first set down in *Pike v. Bruce Church, Inc.*[70] Under the balancing test, "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[71] Thus, to prevail under the *Pike* test, a challenger to a statute must show: (1) that the statute is not even-handed, (2) that there is no legitimate local public interest, or (3) that the burden imposed on interstate commerce by the statute is not clearly excessive in relation to the putative local benefits.

Since the Court in *City of Philadelphia* viewed the New Jersey statute as patently discriminatory, the Court applied its per se rule and determined the statute to be unconstitutional.[72] For this reason, the court neither explored nor addressed the extent of state interfer-

66. 437 U.S. 617 (1978).
67. 437 U.S. at 623-24.
68. *Id.* at 624.
69. *Id.* at 626. The Court explained that "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.*
70. 397 U.S. 137 (1970).
71. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978), *citing* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
72. 437 U.S. at 628. The Court held that "[t]he New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state interests the full burden of conserving the state's remaining landfill space." *Id.*

ence in interstate commerce that would be justifiable under the *Pike* balancing test as necessary to accomplish conservation and public health and safety goals.

In dicta, the Supreme Court suggested two ways that a state might regulate or influence interstate commerce in solid waste without violating the commerce clause.[73] One solution proposed that New Jersey slow the flow of all waste into state landfills to preserve the landfill space.[74] With this suggestion, however, interstate commerce may be incidentally affected. A second suggestion left open the possibility that New Jersey could accomplish its goals by becoming a market participant rather than a market regulator.[75] These suggestions, however, are not the only options available to states in the regulation of solid waste in interstate commerce. For example, subsequent case law[76] refining the two-part dormant commerce clause analysis suggests alternatives beyond those mentioned in *City of Philadelphia.*

In the year following the Supreme Court's decision in *City of Philadelphia*, the Court decided another dormant commerce clause case involving a state's attempts to protect its natural resources. *Hughes v. Oklahoma*[77] centered on an Oklahoma statute banning the transportation of minnows out of Oklahoma if the minnows were seined or procured within Oklahoma.[78] At the time of *Hughes*, the Supreme Court had not overruled its decision in *Geer v. Connecticut.*[79] Oklahoma argued that the statute before the Court was valid under *Geer* because of the similarity between the two cases. Rather than applying the *Geer* analysis, however, the *Hughes* Court explicitly overruled *Geer.*[80] Noting that it rejected the *Geer* analysis in every case involving natural resources other than wild game, the Supreme Court held that state regulation of wild animals should be reviewed under the same general analysis applied to state regulation of other natural resources.[81]

The *Hughes* Court analyzed the Oklahoma statute under the two-part test described in *City of Philadelphia. Hughes* demonstrates a method of analysis for determining the constitutionality of

73. *Id.*
74. *Id.* at 626.
75. *Id.* at 627 n.6.
76. *See infra* notes 77-104 and accompanying text.
77. 441 U.S. 322 (1979).
78. OKLA. STAT., tit. 29, § 4-115(B) (Supp. 1981).
79. 161 U.S. 519 (1896). *See supra* notes 47-53 and accompanying text.
80. 441 U.S. at 335.
81. *Id.*

discriminatory statutes that *City of Philadelphia* referred to as per se invalid. According to *Hughes* the burden to show that a state statute is discriminatory rests on the party challenging the validity of the statute.[82] When discrimination against interstate commerce is demonstrated, however, the state has the burden of showing that there is a legitimate local purpose for the statute.[83] Further, the state must show that there are no adequate non-discriminatory alternatives available to accomplish that legitimate purpose.[84] The *Hughes* Court held that Oklahoma's interest in maintaining the ecological balance in the state's waters by avoiding the removal of inordinate numbers of minnows could qualify as a legitimate local purpose. Unfortunately, there were other adequate non-discriminatory alternatives available that would better accomplish that purpose.[85] While *Hughes* indicated that conservation of natural resources could be a legitimate purpose for state regulation interfering with interstate commerce, it held that the Oklahoma statute could not withstand the high level of scrutiny applied by the Court to the analysis of discriminatory laws.

C. *Recognizing Discriminatory Statutes*

The Supreme Court applies different levels of scrutiny when state laws interfering with interstate commerce are challenged. Distinctions are drawn depending on whether the law is a discriminatory, protectionist measure, or an evenhanded measure. It is important to know the difference between the two types of laws. The Supreme Court, in *Sporhase v. Nebraska ex. rel Douglas*,[86] shed some light on the factors it considers to determine whether a statute is discriminatory.

Sporhase discussed the validity of a Nebraska statute relating to the export of groundwater, which required that:

> Any person . . . intending to withdraw groundwater from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so.

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82. *Id.*
83. *Id.* at 336.
84. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979), *citing* Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333, 353 (1977). The Supreme Court also stated that it is not bound by the description or characterization given to the statute by the legislature or the state courts, but determines for itself the practical import of the law. 441 U.S. at 336, *citing* LaCoste v. Louisiana Dep't of Conservation, 263 U.S. 545, 550 (1924).
85. *Hughes*, 441 U.S. at 338.
86. 458 U.S. 941 (1982).

> If the Director of Water Resources finds that the withdrawal of the groundwater requested is reasonable, is not contrary to the conservation and use of groundwater, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport groundwater from that state for use in the State of Nebraska.[87]

This statute imposed restrictions on the out-of-state use of groundwater only. The *Sporhase* court noted, however, that *other* Nebraska regulations placed restrictions on the use of groundwater *within* the state. The Court used the *Pike* test[88] to analyze the three conditions of the challenged regulation for withdrawal of groundwater. The *Sporhase* court stated that a facial examination of the first three conditions of the regulation did not indicate that those conditions impermissibly burdened interstate commerce.[89] Further, the Court noted that, "a state that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the state."[90] In effect, the *Sporhase* Court held that the first three conditions of the challenged regulation were evenhanded in light of the overall regulatory scheme that Nebraska had created for groundwater.[91] By doing so the court held that a state that imposes substantially different burdens on in-state and out-of-state interests is *not* necessarily discriminating against the out-of-state interests for purposes of commerce clause analysis.[92]

Applying the *Pike* test, the *Sporhase* court accorded presumptive validity to the actions taken by Nebraska to protect its re-

87. *Id.* at 944.
88. *See supra* notes 71-72 and accompanying text.
89. 458 U.S. at 957.
90. *Id.* at 955-56.
91. *Id.*
92. The New Jersey Supreme Court relied on the *Sporhase* court's analysis to uphold a state court injunction that prohibited a New Jersey landfill from accepting solid waste generated in Pennsylvania and which imposed mandatory recycling responsibilities and other restrictions on the New Jersey communities that were authorized to send their solid waste to the landfill. Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders, 100 N.J. 134, 495 A.2d 49 (1985), *cert. denied*, 474 U.S. 1008 (1985). In interpreting *Sporhase*, the New Jersey Supreme Court noted that the United States Supreme Court, in *Sporhase*, had held Nebraska's water conservation program to be evenhanded under the *Pike* test because it imposed "burdens, albeit different ones, on in-state and out-of-state users." 495 A.2d at 57. The New Jersey Supreme Court then held that the state court injunction being reviewed in *Glassboro* was evenhanded because it distributed burdens, albeit different ones, on the Pennsylvania and New Jersey municipalities that had been disposing of solid waste at the landfill prior to the injunction, *id.*, and the New Jersey Supreme Court upheld the state court injunction under the *Pike* test. 495 A.2d at 59.

sources. To support its holding, the Court explained that,

> in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable, measures taken by a state to conserve and preserve for its own citizens this vital resource in times of severe shortage . . . [A] state's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation on the other.[93]

The Court in *Sporhase*, however, struck down the fourth condition of the challenged statute, the reciprocity condition, because it violated the commerce clause.[94] This action demonstrated the factors considered when determining whether state regulation that affects interstate commerce is discriminatory. Finding that the reciprocity condition was discriminatory because it operated as an explicit barrier to all commerce in groundwater between Colorado and Nebraska,[95] the Court analyzed the reciprocity condition under the strict *City of Philadelphia* test, rather than the *Pike* test. The *Sporhase* decision is significant because it illustrates that the Supreme Court will look beyond the law being challenged and will explore the broader regulatory framework in which the law is set to determine whether the law is discriminatory. Additionally, the case is noteworthy because it holds that a state that imposes severe restrictions on its own citizens to protect its natural resources may impose similar restrictions on out-of-state interests without an unconstitutional violation of the commerce clause.

A final major Supreme Court decision, *Maine v. Taylor*,[96] indicates that even state regulations that discriminate against interstate commerce may be upheld if they survive the heightened scrutiny established in *City of Philadelphia* and *Hughes*. *Maine v. Taylor* involved a challenge to a Maine statute that made it a crime to import live bait fish into the state.[97] Maine argued that the importation of live baitfish would place its population of wild fish at risk.[98] First, the out-of-state fish might be infected with one or more of three

93. *Id.* at 956.
94. *Id.* at 958.
95. Sporhase v. Nebraska *ex. rel.* Douglas, 458 U.S. 941, 957 (1982).
96. 477 U.S. 131 (1986).
97. ME. REV. STAT. ANN. tit. 12, § 7613 (1981).
98. 477 U.S. at 141.

types of parasites prevalent outside of Maine, but not common to Maine. Second, the imported fish would disturb Maine's aquatic ecology by competing with Maine's fish for food, habitat, or by preying on native species. Third, imported fish would disrupt the environment in more subtle ways.[99] Maine also argued that no satisfactory way exited to inspect the shipments of live baitfish for the non-native parasites.[100]

The Court held that the Maine law was discriminatory and directly restricted interstate trade by blocking the importation of live baitfish at the state's border.[101] Applying the strict scrutiny standard of *Hughes v. Oklahoma*, the Court held that Maine's law served a legitimate local purpose. Because nondiscriminatory alternatives could not serve this purpose as well, the statute was held constitutional.[102] The Court distinguished the Maine statute from the statute in *City of Philadelphia*, describing the statute in *City of Philadelphia* as an example of simple economic protectionism.[103] In the Court's words:

> The Commerce Clause significantly limits the ability of states and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a state does not needlessly obstruct interstate trade or attempt "to place itself in a position of economic isolation," . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.[104]

IV. Analysis of Executive Order 1989-8

A. Inherent Limitations

Several provisions of Executive Order 1989-8 may impact on the interstate flow of solid waste. In particular, the temporary moratorium on the issuance of new permits for municipal waste landfills or resource recovery facilities unless at least 70% of the waste to be disposed of at the facility was generated in Pennsylvania,[105] the temporary volume limitations for all municipal waste landfills,[106] and the

99. *Id.*
100. *Id.* at 141-42.
101. *Id.* at 137-38.
102. Maine v. Taylor, 477 U.S. 131, 151 (1986).
103. *Id.* at 148.
104. *Id.* at 151, *citing* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935).
105. 4 PA. CODE § 7.471(a) (1990).
106. *Id.* § 7.472.

temporary moratorium on new approvals for disposal of sewage sludge in municipal waste landfills[107] will probably place an incidental burden on the interstate flow of solid waste. A review of the provisions under the Supreme Court's dormant commerce clause analysis, however, demonstrates the constitutionality of the Executive Order.

Two provisions of the Executive Order, the sewage sludge moratorium[108] and the volume limitations,[109] are virtually unassailable under a commerce clause analysis. Both of these restrictions apply uniformly to all municipal waste landfills in Pennsylvania without regard to the origin of the waste that is disposed of at the facility. Because they are non-discriminatory in purpose and effect, the restrictions must be analyzed under the *Pike* test.[110] If the sewage sludge moratorium and the waste volume limitations serve a legitimate local public interest and do not impose a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits,[111] they must be upheld under the *Pike* test.

The limitations of Executive Order 1989-8 serve many public health, safety, and environmental interests that constitute legitimate local public interests. In particular, the limitations of Executive Order 1989-8 are designed to reduce the threat to Pennsylvania's natural resources from landfill wastes and to eliminate landfill acreage from other uses in perpetuity. The Order's limitations are also designed to assure long-term municipal waste capacity to serve the needs of the Commonwealth and to prevent unnecessary and uncontrolled risks to the health, safety, or welfare of the people of the Commonwealth.[112]

An analysis of Executive Order 1989-8 reveals that the burden imposed on interstate commerce by the volume limitations and sewage sludge moratorium is not clearly excessive in relation to the putative local benefits. The volume limitations and the sewage sludge moratorium are temporary measures that remain in effect only until DER adopts a state-wide municipal waste management plan.[113] In particular, the volume limitations required by the Executive Order are based on the actual daily volume of waste disposed of at the

107. *Id.* § 7.471(b).
108. *Id.*
109. *Id.* § 7.472.
110. *See supra* notes 71-72 and accompanying text.
111. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
112. 19 Pa. Bull. 4598, 4599 (1989).
113. *See* 4 PA. CODE § 7.473 (1990). The Executive Order requires DER to prepare a proposed statewide municipal waste management plan by September 26, 1991. *Id.*

landfill.[114]

Additionally, the Executive Order provides for exemptions from the volume limitations and sewage sludge moratorium, further minimizing the impact of those limitations on interstate commerce.[115] For example, the Executive Order authorizes DER to allow municipal waste landfills to accept volumes of waste greater than the volume limits established pursuant to the Executive Order in certain situations.[116] With respect to the sewage sludge moratorium, this applies only to new permit modifications for disposal of sewage sludge.[117] If a landfill is already authorized by permit to dispose of sewage sludge, it may continue to accept sewage sludge in accordance with the terms of its permit, modified by any volume limits imposed pursuant to the Executive Order.[118] Therefore, the burdens placed on interstate commerce by the volume limitations and sewage sludge moratorium in the Executive Order cannot be said to be clearly excessive in relation to the putative local benefits of the limitations. Since the volume limitations and sewage sludge moratorium are evenhanded, serve a legitimate public interest, and do not impose a burden on interstate commerce that is clearly excessive in relation to the putative local benefits,[119] they satisfy the three requirements of the *Pike* test. Those limitations, therefore, are constitutional exercises of Pennsylvania's police power.

B. An Analysis of the 70% Limitation

Another limitation imposed by Executive Order 1989-8, the 70% limitation, also satisfies the requirements of the *Pike* test[120] as the Supreme Court applied the test in *Sporhase v. Nebraska ex rel Douglas*.[121] As noted above, the Executive Order imposes a temporary moratorium on the issuance of new permits for municipal waste landfills or resource recovery facilities unless at least 70% of the waste to be disposed of at the facility was generated in Pennsylvania.[122] Initially, it appears that the 70% limitation imposed by the Executive Order is a discriminatory measure because it seems to treat waste generated within Pennsylvania differently than waste

114. *Id.* § 7.472(a).
115. *Id.* §§ 7.472(b)-(d).
116. *Id.*
117. *Id.* § 7.471(b).
118. 4 PA. CODE § 7.472(e).
119. Pike v. Bruce Church, Inc., 394 U.S. 137, 142 (1970).
120. *See supra* notes 70-71 and accompanying text.
121. 458 U.S. 941 (1982).
122. 4 PA. CODE § 7.471(a).

generated outside of Pennsylvania.[123] The Supreme Court, however, indicated in *Sporhase* that regulating in-state and out-of-state interests differently is not necessarily discriminating against out-of-state interests.[124] In analyzing the permit requirement for the transfer of groundwater that applied only to transfers of groundwater out-of-state, the Supreme Court examined Nebraska's entire regulatory scheme for the transfer of groundwater. The Court noted that, "a state that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the state.[125] The Court then weighed the burdens placed on in-state and out-of-state interests by the state regulatory scheme to determine whether the regulatory provision before the Court was discriminatory.

Pennsylvania already has stringent municipal waste planning, minimization, and recycling requirements and a beneficial use and reuse program for municipal and residual waste, all of which severely limit the amount of Pennsylvania waste that can be disposed of at Pennsylvania landfills or resource recovery facilities. The 70% limitation in Executive Order 1989-8 places similar limitations on the amount of waste generated outside of Pennsylvania that can be disposed of in Pennsylvania. Since Pennsylvania places severe restrictions on the use of the Commonwealth's natural resources (land) for its own citizens, it does not discriminate when it seeks to impose similar restrictions on the use of those same natural resources by out-of-state interests. In light of the Supreme Court's analysis in *Sporhase*,[126] the 70% limitation is an evenhanded, non-discriminatory measure that satisfies the first requirement of the *Pike* test.

The 70% limitation of the Executive Order also satisfies the second requirement of the *Pike* test. That is, it serves numerous legitimate local public interests (including protection of the Commonwealth's natural resources), provides assurance of long-term municipal waste disposal capacity in Pennsylvania, and protects public health, safety, and welfare.[127] These are the same reasons why the sewage sludge moratorium and volume limitation satisfied the second

123. It may be argued that the 70% requirement of 4 PA. CODE § 7.471(a) discriminates against waste generated outside of the Commonwealth because the measure limits the amount of waste generated outside of the Commonwealth that may be disposed of in certain landfills and does not place similar limits on the amount of waste generated within the Commonwealth that may be disposed of in those landfills.

124. 458 U.S. at 955-56.

125. *Sporhase*, 458 U.S. at 955-56.

126. *See supra* notes 86-95 and accompanying text.

127. 19 Pa. Bull. 4598, 4599 (1989).

requirement of the *Pike* test.

Finally, the 70% limitation of Executive Order 1989-8 places an incidental burden on interstate commerce that is not clearly excessive in relation to the local benefits of the limitation. Therefore, the 70% limitation meets the third requirement under *Pike*. Statistics compiled by DER at the time of the Executive Order indicated that 30% of the municipal waste that was disposed of in Pennsylvania was generated outside of Pennsylvania, while 70% of the waste was generated within Pennsylvania.[128] Requiring certain facilities to demonstrate that 70% of the municipal waste that will be received at the facility is generated within Pennsylvania before the issuance of a new municipal waste permit, therefore, does little more than stabilize the volume of out-of-state waste that is disposed of in those facilities. This stabilized level is equal to the percentage of out-of-state waste that was disposed of in Pennsylvania at the time of the Executive Order. Furthermore, under the terms of the Executive Order, the moratorium on permit issuances is a temporary moratorium and will last only until DER has adopted a statewide municipal waste management plan.

In summary, because the 70% limitation of the Executive Order is evenhanded, serves a legitimate local purpose, and places an incidental burden on interstate commerce that is not clearly excessive in relation to the putative local benefits of the limitation, it satisfies the three requirements of the *Pike* test.

1. Heightened Scrutiny.—The *Pike* test is the proper analysis to be used by a court when reviewing the 70% limitation in Executive Order 1989-8. This limitation, however, could withstand even the heightened scrutiny test outlined by the Supreme Court in *City of Philadelphia v. New Jersey*, *Hughes v. Oklahoma*, and *Maine v. Taylor*. The Supreme Court distinguished state regulation of interstate trade that encourages economic isolation from state regulation that protects the health and safety of its citizens and the integrity of its natural resources. The Court held that the latter form of regulation is constitutionally valid while the former is not.[129] For example, in *City of Philadelphia*, New Jersey's statute created economic isolation by completely banning the importation of solid waste into the state. Specifically, the statute "impos[ed] on out-of-state interests

128. *Id.*
129. Maine v. Taylor, 477 U.S. 131, 151 (1986).

the full burden of conserving the state's remaining landfill space."[130] As a result, the statute was struck down. The 70% limitation of the Order, however, does not place Pennsylvania in a position of economic isolation, but instead protects the health and safety of the citizens of Pennsylvania while placing an incidental burden on interstate commerce. Therefore, under this analysis, the statute is constitutionally valid.

A court will not review state regulation of interstate commerce under the heightened scrutiny of *City of Philadelphia* and its progeny unless the challenger shows that the state regulation discriminates against interstate commerce. If a challenger could satisfy this burden with regard to the 70% limitation of Executive Order 1989-8, the limitation would be unconstitutional only if there existed no legitimate purpose for the limitation, or if the legitimate purpose for the limitation could be achieved by other available nondiscriminatory alternatives. There are numerous legitimate purposes for the 70% limitation of the Executive Order. Those purposes, however, cannot be achieved by available nondiscriminatory means.[131] The 70% limitation is, therefore, a constitutional exercise of Pennsylvania's police power under the heightened scrutiny of *City of Philadelphia* and its progeny.

2. Assuring Disposal Capacity.—In order to protect public health and safety and to avoid the problems caused by the illegal disposal of solid waste within the Commonwealth, Pennsylvania must ensure that it has sufficient disposal capacity to provide for the needs of its own citizens. At the same time, however, solid waste disposal creates numerous public health and safety hazards and prevents land in Pennsylvania from being put to more productive uses in perpetuity. For this reason, it is important to reduce the total volume of solid waste disposed of in Pennsylvania. The goals of the 70% limitation of Executive Order 1989-8 are intended to provide for sufficient municipal waste disposal capacity in Pennsylvania for its citizens and to reduce the total volume of waste disposal of the state.

No adequate nondiscriminatory alternatives to the 70% limitation exist that would achieve its legitimate goals. The root of the problem addressed by the 70% limitation is the volume of solid waste disposed of in Pennsylvania. Pennsylvania has the ability to

130. City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

131. For purposes of analysis only, the remainder of this article assumes that a challenge to the Executive Order has satisfied the burden of showing that the 70% limitation of the Executive Order discriminates against interstate commerce.

severely limit the amount of waste generated within Pennsylvania and disposed of in Pennsylvania. The state cannot, however, limit the total amount of waste disposed of in Pennsylvania *and* provide adequate disposal capacity for the waste generated within Pennsylvania without imposing some direct limitations on the amount of imported waste that may be disposed of in Pennsylvania.

Simply limiting the total volume of waste that may be disposed of in Pennsylvania without limiting the volume of waste generated out-of-state that may be disposed of in Pennsylvania would not achieve the goals of the 70% limitation. Although such a limitation would reduce the total volume of waste disposed of in Pennsylvania, it would not guarantee sufficient disposal capacity in Pennsylvania for the waste generated within the Commonwealth. Furthermore, the decrease in the amount of disposal capacity in Pennsylvania created by such a limitation would lead to higher prices for disposal in Pennsylvania and more competition for the limited amount of disposal space. These increased costs and competition could encourage illegal disposal activity within the Commonwealth, endangering public health and safety.

No nondiscriminatory alternative could achieve the legitimate public health and safety goals of the 70% limitation. Although the limitation may be challenged as discriminatory, it is clearly the least discriminatory alternative available to achieve those goals. It is a temporary limitation applying only to new facilities and merely requiring that the percentage of waste generated outside of Pennsylvania to be disposed of within the state be limited to the percentage of waste generated outside of Pennsylvania already being disposed of in landfills and resource recovery facilities across the Commonwealth at the time the Executive Order was issued. This burden on interstate commerce is incidental. For the reasons set forth in this Article, the 70% limitation is constitutional under each of the commerce clause tests established by the Supreme Court.

VI. Conclusion

In the decade or so following the Supreme Court's decision in *City of Philadelphia v. New Jersey*, the lower federal courts have been reluctant to validate state efforts to slow the interstate flow of solid waste if the state efforts are not one of the two types of state action discussed by the *City of Philadelphia* Court in footnote six of the opinion. In short, the lower federal courts have approved state programs that involve the state as a market participant and state

programs that place identical burdens on waste generated out of state and at least some waste generated in the state, but have been reluctant to approve any other types of state programs.

Although the lower federal courts are reluctant to approve state actions other than the two types of schemes discussed in the *City of Philadelphia* footnote, the Supreme Court's dormant commerce clause analysis has evolved substantially since that case was decided. *Hughes v. Oklahoma* and *Maine v. Taylor* have taught legal analysts that the *City of Philadelphia*'s per se rule of invalidity for discriminatory state statutes is not necessarily a per se rule after all, and *Sporhase ex rel. Douglas v. Nebraska* has illustrated that it is no longer a simple task to determine what constitutes a discriminatory state statute.

Although the Supreme Court has not revisited the issue of the conflict between state regulation of solid waste flow and the dormant commerce clause since *City of Philadelphia*, the Court has refined its dormant commerce clause analysis since that decision so that a wider variety of state regulatory schemes may theoretically be justified under the refined analysis as opposed to the two types of schemes discussed in the *City of Philadelphia* footnote. In that vein, Executive Order 1989-8 demonstrates that, under the Supreme Court's refined commerce clause analysis, states have the ability to constitutionally regulate solid waste management in an effort to conserve natural resources and protect public health, safety, and the environment in ways that go beyond the limited spectrum suggested in *City of Philadelphia.*